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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 DANNETTE GONZALEZ,

8
9 Plaintiff,

10 v.

11 NATIONAL RAILROAD PASSENGER
CORPORATION (AMTRAK),

12
13 Defendant.

Case No. C08-0093 MJP

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

14
15 This matter comes before the Court on Defendant's motion for summary judgment. The
16 Court has considered the motion (Dkt. No. 42), Plaintiff's response (Dkt. No. 47), Defendant's
17 reply (Dkt. No. 51), all pertinent documents in the record, and the parties' presentations at oral
18 argument. For the reasons set forth below, the Court GRANTS Defendant's motion.

19 Background

20 Defendant Amtrak hired Plaintiff Gonzalez in March 2005 as a part-time Coach
21 Cleaner and promoted her to a full-time Laborer position in June 2006. (Duncan Decl., Exs.
22 1-2.) Plaintiff was trained for her new position by Minh Ngo, one of her fellow Laborers. (Id.
23 ¶ 8.) A Laborer is responsible for several tasks, including "sanding" the train engines,
24 "picking up the pits" (cleaning an area beneath the trains), picking up trash in the train yard,
25 and tying up and compressing boxes. (Davis Decl., Ex. B at 64:5-23; 123:3-130:10.) Each
Laborer receives different assignments each day. (Davis Decl., Ex. B at 123:3-130:10; Ex. C
at 23:3-25.) Laborers work under the supervision of several Foremen, including Mark Ragle

1 and Tom Walker. (Davis Decl., Ex. B at 43:19-44:1; 45:17-20.) The Superintendent of the
2 Seattle facility, Jeff Duncan, supervises the Foremen. (Duncan Decl. ¶ 2.)

3 Starting in August 2006, Plaintiff complained that she felt she was receiving a heavier
4 workload and more difficult tasks than the male Laborers. (Davis Decl., Ex. B at 74:13-24;
5 96:13-17; 101:8-10; 168:5-169:12.) Plaintiff also felt that Minh Ngo's behavior toward her
6 was hostile and motivated by her gender. (Gonzalez Decl. ¶¶ 8-12; Davis Decl., Ex. B at
7 84:10-89:8.) When Plaintiff could not work things out with Mr. Ngo directly, she complained
8 about his behavior to Mr. Ragle. (Davis Decl., Ex. B at 101:16-102:14.)

9 On February 11, 2007, Larry Johnson, a Machinist, relayed to Plaintiff that Mr. Ngo
10 told him that Plaintiff "just want[ed] to lay around in the ladies locker room complaining
11 about [her] pussy and [her] period and [her] cramps and how [her] vagina hurts and that's all
12 you bitches do." (Gonzalez Decl. ¶ 12.) Plaintiff complained about what she had heard, first
13 to Foreman Tom Walker and later to Superintendent Duncan. (Black Decl., Ex. D at 000861-
14 62; Gonzalez Decl. ¶ 13; Davis Decl., Ex. B at 226:13-227:24.)

15 In response to Plaintiff's complaint, Mr. Duncan instructed Mr. Walker to separate
16 Plaintiff from Mr. Ngo in work assignments. (Duncan Decl. ¶ 11.) On February 13, 2007,
17 Mr. Duncan reported Plaintiff's complaint to the Amtrak Dispute Resolution Office ("DRO")
18 in order to begin the formal investigation process. (Duncan Decl. ¶ 10.) In March 2007,
19 Investigator Rickie Donofrio interviewed Plaintiff regarding the complaint. (Donofrio Decl. ¶
20 4.) Ms. Donofrio then traveled to Seattle in August, 2007, to interview several Amtrak
21 employees involved in the incident, including Mr. Ngo. (Black Decl., Ex. K at 1.) During the
22 interview, Ms. Donofrio chastised Mr. Ngo so loudly that Mr. Duncan heard it through the
23 wall. (Duncan Decl. ¶ 12.) She told Mr. Ngo that his behavior was unacceptable and must
24 stop immediately. (Donofrio Decl. ¶ 6.) After the interview, Mr. Ngo offered to apologize to
25 Plaintiff, but Plaintiff refused. (*Id.* ¶ 7.) Ms. Donofrio wrote to Plaintiff in September 2007,
informing her that all but one of Plaintiff's allegations against Mr. Ngo had been confirmed

1 during the investigation, stating that “appropriate action” had been taken, and closing the file
2 on the matter. (Black Decl., Ex. K.) Mr. Duncan brought formal charges against Mr. Ngo as
3 well. (Donofrio Decl. ¶ 9.) Amtrak held a disciplinary hearing on December 11, 2007, where
4 the charges against Mr. Ngo were dismissed. (Gonzalez Decl. ¶ 32; Black Decl. ¶ 19.)

5 After receiving the letter closing the file from the DRO in September, Plaintiff
6 completed an EEOC intake questionnaire and charge of discrimination regarding Mr. Ngo’s
7 statement to Larry Johnson. (Black Decl., Ex. I.) In October 2007, the EEOC informed
8 Plaintiff that it was unable to conclude that a violation of the relevant statutes had occurred
9 and closed the file on Plaintiff’s charge. (Black Decl., Ex. N.)

10 Also in October, Plaintiff again complained to Mr. Ragle about the double-standard
11 she perceived between how she and the male Laborers were treated. (Gonzalez Decl. ¶ 24.)
12 Mr. Ragle responded, “Here we go again. You’re going to call diversity.” (*Id.* ¶ 25.) Mr.
13 Ragle then reported his comment to Mr. Duncan, and the incident was reported to the DRO.
14 (Davis Decl., Ex. C at 60:5-21.) On November 9, 2007 Plaintiff filed a second charge with
15 the EEOC, stating that Mr. Ragle’s comment was made in retaliation for her previous
16 complaint of discriminatory conduct. (Black Decl., Ex. O.) The EEOC responded on
17 November 29th that it was unable to find a violation based on Plaintiff’s allegations. (Black
18 Decl., Ex. P.) Plaintiff filed her complaint with this Court on January 18, 2008. (Dkt. No. 1.)

19 Analysis

20 Defendant moves for summary judgment on Plaintiff’s claims, under Title VII and the
21 Washington Law Against Discrimination (“WLAD”), of sexual harassment and retaliation, as
22 well as on her common law tort claim of outrage. (Dkt. No. 42.) Although Plaintiff argues
23 that she also pled a gender discrimination claim, she does not present facts that would support
24 a prima facie case for such a claim.

1 1. Summary Judgment Standard

2 Summary judgment is appropriate if the evidence on file shows that there is no
3 genuine issue as to any material fact and that the moving party is entitled to judgment as a
4 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden to make this
5 showing. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party meets
6 this burden, the burden shifts to the nonmoving party to establish the existence of an issue of
7 material facts. Id. at 323-34. The nonmoving party may not rely on its pleadings, but instead
8 must provide evidence demonstrating a genuine issue for trial. Id. 324. On a motion for
9 summary judgment, the Court views the evidence in the light most favorable to the non-
10 moving party. Margolis v. Ryan, 140 F.3d 850, 852 (9th Cir. 1998).

11 2. Sexual Harassment Charge

12 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., prohibits sexual
13 discrimination in employment. 42 U.S.C. § 2000e-2(a)(1) (2007). Title VII's prohibition
14 against discrimination also extends to sexual harassment and hostile work environments.
15 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986). Because WLAD tracks federal
16 discrimination law, a plaintiff's federal and state discrimination claims may be analyzed
17 together. Little v. Windermere Relocation, Inc., 301 F.3d 958, 966 (9th Cir. 2002).¹

18 An employer is liable for a hostile environment created by co-workers only if, after
19 learning of the harassing conduct, the employer takes no "adequate remedial measures."
20 Yamaguchi v. United States Dept. of the Air Force, 109 F.3d 1475, 1483 (9th Cir.1997).
21 Remedial measures should be "reasonably calculated to end the harassment." Fuller v. City of
22 Oakland, 47 F.3d 1522, 1528 (9th Cir. 1995) (quotations omitted). To satisfy its remedial
23 obligation, the employer must first take temporary steps to deal with the situation, and then it
24 must take permanent remedial steps. Swenson v. Potter, 271 F.3d 1184, 1192 (9th Cir. 2001)

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¹ Plaintiff mistakenly asserts that Defendant does not address her WLAD claims. (Dkt. No. 47 at 2.) Defendant's motion notes that because Washington discrimination law parallels that of Title VII, it is appropriate to consider both state and federal claims together. (Dkt. No. 42 at 11.)

1 (citations omitted). Defendant argues that because it took effective remedial actions as
2 required by Swenson, summary judgment is proper on Plaintiff's sexual harassment claim.

3 a. Temporary Remedial Steps

4 No genuine issue of fact exists as to whether Defendant took temporary remedial
5 measures. The Swenson court found that where no further harassment resulted after the
6 employer's separation of the harasser from the employee, the separation was an adequate
7 remedial measure. Id. at 1192-93 (noting that the "degree of separation . . . must be a function
8 of the severity of the alleged harassment"). In this case, Mr. Duncan instructed Foreman
9 Walker to separate the two Laborers in their work locations. (Duncan Decl. ¶ 11.) Mr.
10 Walker assigned Plaintiff to work inside in the warehouse and Mr. Ngo to work outdoors in
11 the "pit" washing an engine. (Black Decl., Ex. D at 000862; Davis Decl., Ex. B at 162:25-
12 163:24.) Plaintiff acknowledged that after her complaint (and the subsequent separation), Mr.
13 Ngo did not bother her any more: "it was like his lips were sealed." (Black Decl., Ex. M.)
14 Although Plaintiff argues that she and Mr. Ngo were not actually separated, she provides no
15 specific facts to support that contention. (Gonzalez Decl. ¶ 17.) There is no dispute that the
16 separation occurred and that Mr. Ngo's harassing conduct ended. Thus, the separation was an
17 adequate remedial measure.

18 In addition to separating the employees, Defendant also immediately began an
19 investigation. (Duncan Decl. ¶ 10.) A prompt investigation is the most significant immediate
20 measure an employer can take. Swenson, 271 F.3d at 1193. Plaintiff argues that the
21 investigation was inadequate remedial measure because it took seven months to complete and
22 the Laborer's Collective Bargaining Agreement ("CBA") prohibits disciplinary action more
23 than thirty days after the transgression. (Dkt. No. 47 at 19-20.) However, the CBA expressly
24 provides that the employer can bring charges against an employee more than thirty days after
25 learning of the offense if a civil or criminal action results. (Duncan Decl., Ex. 3 at D10307.)

In this case, because Plaintiff filed this lawsuit in response to the offense, the thirty-day period

1 does not apply. Both the employee separation and the prompt initiation of the investigation
2 constitute temporary remedial measures.

3 b. Permanent Remedial Steps.

4 The parties also do not dispute the actions constituting Defendant's permanent
5 responses. An employer must take permanent remedial steps that are reasonably designed to
6 end the harassment. Swenson, 271 F.3d at 1192. The Ninth Circuit has held that counseling
7 or admonishing the offender may be sufficient. Star v. West, 237 F.3d 1036, 1038-39 (2001)
8 (employer's admonishing and warning harasser constituted a remedial measure). The parties
9 do not dispute that in August 2007 Ms. Donofrio interviewed Mr. Ngo, or that after the
10 meeting Mr. Ngo attempted to apologize to Plaintiff. (Donofrio Decl. ¶¶ 6, 7; Dkt. No. 42 at
11 9; Dkt. 47 at 20.) Although Plaintiff argues that this meeting does not legally constitute a
12 "prompt remedial action," she disputes neither the meeting's occurrence nor its results. (Dkt.
13 No. 47 at 20.) The parties also do not dispute that, upon Ms. Donofrio's completion of the
14 investigation, Mr. Duncan requested formal charges against Mr. Ngo and that a disciplinary
15 hearing was held. (Dkt. No. 42 at 11; Dkt. No. 47 at 11.)

16 Plaintiff's argument that the steps taken were insufficiently prompt is unavailing.
17 Swenson distinguishes between employer responses that must be "immediate" and those that
18 must be "permanent." Swenson, 271 F.3d at 1192. In Swenson, the employer's permanent
19 steps were sufficient when they were taken at the conclusion of the investigation, several
20 months later. Id. at 1189-90. Here, Ms. Donofrio chastised Mr. Ngo during the investigation,
21 approximately six months after Plaintiff's initial complaint, and formal charges were filed at
22 the completion of the investigation. Plaintiff's argument that Defendant took no
23 "disciplinary" action also fails. (Dkt. No.47 at 19-21.) The Ninth Circuit has held that an
24 employer's responses to a complaint need not be labeled "disciplinary" to qualify as remedial
25 actions. Star, 237 F.3d at 1038-39. Therefore, Ms. Donofrio's meeting in which she chastised
Mr. Ngo constitutes an adequate remedial action.

1 Because no genuine issue of material fact exists regarding Defendant's remedial
2 measures, summary judgment on Plaintiff's sexual harassment claim is appropriate.

3 3. Retaliation Charge

4 Title VII's anti-retaliation provision prohibits an employer from discriminating against
5 an employee who "opposed any practice" outlawed by Title VII. 42 U.S.C. § 2000e-3(a);
6 Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 56 (2006). For Plaintiff to make out
7 a prima facie case of retaliation, she must show that (1) she engaged in a protected activity,
8 (2) she suffered an adverse employment action, and (3) there was a causal link between her
9 activity and the adverse action. Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1065-66 (9th
10 Cir. 2003). An adverse employment action is one that is "materially adverse," which means
11 that it "well might have 'dissuaded a reasonable worker from making or supporting a charge
12 of discrimination.'" Burlington N., 548 U.S. at 68. Because WLAD tracks federal retaliation
13 law, a plaintiff's federal and state retaliation claims may be analyzed together. Estevez v.
14 Faculty Club of Univ. of Wash., 129 Wn. App. 774, 797 (2005).

15 The parties do not dispute the facts underlying Plaintiff's retaliation claim, but these
16 facts do not create a prima facie case for retaliation. Although Plaintiff engaged in a protected
17 activity, she cannot show that Mr. Ragle's comment to her was materially adverse.² The
18 Supreme Court has stated that "normally, petty slights, minor annoyances, and simple lack of
19 good manners" will not amount to materially adverse actions. Burlington N., 548 U.S. at 68.
20 The Eighth Circuit holds that an employer action is not materially adverse when it has no
21 negative impact on the employee's job performance or status. Higgins v. Gonzalez, 481 F.3d
22 578, 584-85 (8th Cir. 2007) (concluding that employer took no adverse employment action
23 when it changed employee's job duties, recommended her for termination, and transferred her

24 ² Plaintiff alleges a number of supposedly retaliatory actions. (See Dkt. No. 1 at ¶¶ 3.24, 3.26, 3.32.)
25 However, because Plaintiff complained to the EEOC only of Mr. Ragle's comment to her, she was
given the right to sue only in regards to that comment. B.K.B v. Maui Police Dept., 276 F.3d 1091,
1100 (9th Cir. 2002) (noting that unrelated allegations not included in a plaintiff's charge of
discrimination may not be considered). Therefore, the Court considers only whether this comment
constitutes retaliation under Title VII and WLAD.

1 to another office). On October 25, 2007, in response to Plaintiff's complaint about unequal
2 work assignments, Foreman Ragle said, "Here we go again. You are going to call diversity."
3 (Gonzalez Decl. ¶ 26.) Mr. Ragle's comment does not rise above a petty slight. Plaintiff does
4 not contend that Mr. Ragle's comment interfered with her job performance, compensation, or
5 hours. Therefore, the comment cannot constitute a retaliatory action. Plaintiff's retaliation
6 claim fails as a matter of law and summary judgment is proper.

7 4. Outrage and Intentional Infliction of Emotional Distress

8 To prevail on a claim for outrage, Plaintiff must demonstrate: (1) extreme and
9 outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) severe
10 emotional distress on the part of the plaintiff. Robel v. Roundup Corp., 148 Wn.2d 35, 51
11 (2002) (citing Grimsby v. Samson, 85 Wn.2d 52, 60 (1975) (adopting the standards set forth
12 in the Restatement (Second) of Torts § 46(2))). The Washington Supreme Court interprets the
13 first element to mean conduct that is "so outrageous in character, and so extreme in degree, as
14 to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly
15 intolerable in a civilized community." Dicomes v. State, 113 Wn.2d 612, 630 (1989).
16 Summary judgment should be denied "if reasonable minds could differ on whether the
17 conduct was sufficiently extreme to result in liability." Id.

18 Even when the events already discussed are viewed in the light most favorable to
19 Plaintiff, the evidence offered does not meet this high burden. In one of the few cases in
20 which the court found this first element to be met, the plaintiff's supervisor and co-workers
21 insulted her to her face with obscene sexist slurs. Robel, 148 Wn.2d at 40-41 (plaintiff was
22 called "cunt" and "fucking bitch"). This Court has previously held that neither failure to
23 properly investigate a discrimination claim nor termination of employment can meet this first
24 element. Hancock v. State, No. 06-0668-MJP, 2007 WL 1367600, at *6 (W.D. Wash. May 7,
25 2007). Defendant's purportedly inadequate separation of Plaintiff and Mr. Ngo is not
sufficiently outrageous; nor is the delayed investigation, her supervisors' reprimands and

1 irritable comments, or her co-workers' snubs. Reasonable minds could not differ. Therefore,
2 Plaintiff cannot meet the first element of her claim of intentional infliction of emotional
3 distress. Because Plaintiff cannot satisfy the first element of the claim, summary judgment is
4 proper.³


5 5. Gender Discrimination Charge

6 Though it is not clear that Plaintiff brings this claim at all, Plaintiff references a claim
7 for gender discrimination.⁴ (See Dkt. No. 47 at 17). However, even if such a claim exists,
8 Plaintiff alleges insufficient facts to plead a prima facie case. To bring a valid claim of gender
9 discrimination, Plaintiff must show (1) that she is a member of a protected class; (2) that she
10 performed her job satisfactorily; (3) that she suffered an "adverse employment action"; and
11 (4) that she was treated less favorably than a similarly situated employee from an unprotected
12 class. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Cornwell v. Electra
13 Cent. Credit Union, 439 F.3d 1018, 1028 (9th Cir. 2006) (stating elements in a race
14 discrimination case). Plaintiff cannot show that she suffered an adverse employment action.
15 In a gender discrimination claim, an employment action is adverse if it "materially affect[s]
16 the compensation, terms, conditions, or privileges of . . . employment.'" Davis v. Team Elec.
17 Co., 520 F.3d 1080, 1089 (9th Cir. 2008) (quoting Chuang v. Univ. of Cal. Davis, 225 F.3d
18 1115, 1123-24 (9th Cir. 2000)). Here, Plaintiff presents no evidence that any of the allegedly
19 discriminatory actions she experienced affected the terms and conditions of her employment.
20 Therefore, even if Plaintiff's complaint can be read to include the claim, Plaintiff did not
21 plead a prima facie case of gender discrimination.

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25 ³ Even if the first element were met, Plaintiff cannot establish the second. Plaintiff provides no
evidence to suggest that Defendant or any of its personnel intentionally or recklessly caused Plaintiff
to experience severe emotional distress.

⁴ Plaintiff's complaint does not specify her individual causes of action; it merely states the statutes (42
U.S.C. § 2000e et seq. and RCW 49.60 et seq.) under which she brings them.

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Marsha J. Pechman
United States District Judge